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Chapter 1

Introduction

Employee participation in Europe

Ian Fitzgerald

Employee participation at a European level became a reality with the introduction of the European Works Council Directive (94/45/EC); with the potential to expand in scope with the proposals for employee involvement contained in the Supplement (2001/86/EC) to the European Company Statute (2157/2001/EC); and develop at a national level with the universal introduction of national structures of information and consultation (Information and Consultation Directive 2002/14/EC; see EIRR 339/2002 and TUC 2002 for further details). Given this the current book offers a timely collection of essays on the first European level attempt at employee participation, the European Works Council (EWC).

It has been estimated that the EWC Directive covers 1,865 companies who provide around 10 per cent (17.1 million) of the European economic areas (EEA) employees, of which: approximately five million are in Germany; four million the UK; and three million in France (Kerckhofs 2002: 34). Of these companies only around 639 have so far reached agreement on the establishment of a total of 739 EWCs, and Kerckhof's (2002) argues that at the current rate of progress 'it will be another 20 years before all covered companies

have European worker representation bodies' (ibid.: 46). Nevertheless, drawing on our title this book concerns itself with the 'optimism of the will' rather than the 'pessimism of the intellect', however well informed. Following this introduction the book is divided into four main sections, the first has three chapters that provide a series of approaches to understanding the historical development of the Directive, the shape and structure of EWCs and the changing nature of solidarity within an EWC context. The second section's first two chapters are concerned with the proposed review of the EWC Directive, offering contrasting trade union/employer views of what a review should contain, with the third moving from a discussion of the Directive to a consideration of the main factors that influence the choice of management and employee representatives when negotiating EWC agreements. Section three has four chapters on the EWC experience, including three case studies, providing management and trade union perspectives. The last section has three chapters, which in many ways are optimistic in their focus on extending EWCs beyond Europe. Particularly at a time when some are concerned that they are struggling to engage with national structures (see the chapter by Martinez Lucio and Weston). The remainder of this introduction gives a brief account of the prior attempts at European level employee participation and concludes with a summery of the EWC Directive.

EMPLOYEE PARTICIPATION AT A EUROPEAN LEVEL

Prior to the EWC Directive there were three main attempts to 'harmonise' employee participation at a European level through drafts of the Fifth Directive, the Vredeling

Directive, and the European Company Statute (ECS) Directive. The debate around these drafts can be identified within two periods of European Community/Union policy (Müller and Hoffmann 2001: 12) The first is the 1970s to early 1980s and includes the early drafts of all the above directives. It was a period of 'rigid' employee participation proposals, offering little employer choice in the type of representative structures or the information and consultation that was to be provided. When it is considered that this was combined with the then Member State veto it is perhaps not surprising that early drafts of employee participation failed not only because of business interests but also because of Member States defence of their national industrial relations systems. The second period begins in 1983 and is characterised by choice in both representative systems and the type of information and consultation that was to be provided. Significantly it also covers the period of the Social Protocol agreed at Maastricht with the issue of veto being circumvented by the newly adopted route of subsidiarity. This allowed the British Government to opt-out of the Maastricht Social Chapter and consequently the EWC Directive. Member States had been given an increased flexibility over European labour law to allow the social side of the single market to begin to come into force.

The Fifth Directive

The Fifth Directive on the Structure of Public Limited Companies (1972/1983/1990/1991) is part of a series of company law based Directives whose aim was to harmonise the national company law of Member States. The drafts after 1972 included proposals for

employee participation in public limited companies of over 1000 employees, similar to the EWC Directive. It was proposed that this would occur through employee representatives receiving information and consultation on such matters as: 'the closure or transfer of all or part of the company; substantial extension or reduction in the activities of the company; important organisational changes; and the establishment of long-term cooperation with other firms' (Europa 2001a).

Representatives were to participate in one of four main types of structure; (1) on the supervisory board of a two-tier board system (2) as supervisory non-executive members on a one-tier board (3) on an employee only works council (4) through an appropriate representative collective agreement structure. Proposals (1) and (2) contained one-third to a half employee representatives at a board level, whilst in (3) and (4) representatives had information and consultation rights equivalent to those available at a board level.

The main changes in the proposals after 1972 were a rise in the company threshold for activation of the Directive from 500 to 1000 employees and an increased choice of participation systems from the original two-tier board system. Although, even after these and a number of other amendments it still reached an impasse in the European Parliament. The EU views the failure of the Fifth Directive as a difficulty in reconciling the 'fundamental differences between Member States' traditions in the company law field' (Europa 2001b). It goes on state that the legislation itself 'leads to the adoption of extremely detailed and stringent rules' (ibid.) and that with growing world competition there is a need to impose minimum constraints on European firms. Focusing on these issues

from a different perspective Streeck (1997) views the main reason for rejection as being the Directives 'linkage to the issue of industrial citizenship'. He goes on to argue that 'the political costs of changing national systems of corporate governance in a German direction loomed ever larger [whilst employers were opposed] to any Community social policy that went beyond non-binding general principles'.

The Vredeling Directive

The Vredeling Directive (1980/1983), championed by the Dutch socialist Henk Vredeling, dealt exclusively with employee participation and signalled a shift away from company to labour law. It was encouraged by the increasing momentum of the 1974 Social Action Programme, which had assisted the passage of two Directives increasing employee information and consultation (the Collective Redundancies Directive adopted in 1975 and the Transfer of Undertakings Directive adopted in 1977). The 1983 version of the Vredeling Directive covered all firms with at least 1,000 employees in the EU. This was a wide-ranging proposal covering companies with employees in a single Member State and, as with the EWC Directive, making 'provisions for companies controlled from outside the EU' (EIRR 207/1991: 23). It proposed that existing employee representatives (not those on company boards) should receive annual information on a company's activity in the areas of: 'structure; economic and financial situation; probable development of business, production and sales; employment situation and probable trends; and investment prospects' (ibid.: 26). As well as consultation on proposals that were likely to have 'serious

consequences' for employees. The areas covered ranged from restructuring at the workplace through to closures and transfers.

The main changes in the 1983 version of the Vredeling Directive compared to its 1980 original were a substantial rise in the company threshold level from 100 to 1,000 employees and a reduction in the content and regularity of information. The Directive met with what Streeck (1997) describes as 'unprecedented hostility from business', which came from both European and foreign firms (DeVos 1989; Shackleton 1996). The British Conservative government of the time were also strongly opposed, arguing amongst other things that it would 'disrupt existing good industrial relations practices' (quoted in Shackleton 1996: 16) and be inappropriate because of 'the UK's relatively high share of Community inward investment' (ibid.: 16). With Member State veto and strong business opposition the Directive stalled in Council.

The European Company Statute

The European Company Statute (1970/1975/1989/1991/ adopted 2157/2001/EC) was proposed in parallel with the moves towards national company law harmonisation. It provides a non-compulsory opportunity for EU based companies to create a European company (*Societas Europea*) that is recognised as incorporated in law by all Member States. In common with the other Directives discussed above it contains employee participation proposals that were adopted via a second supplementary Directive

(2002/86/EC), which the *Societas Europea* (SE) must follow. The creation of two separate but interrelated Directives followed amendments in 1989 to circumvent unanimous voting by splitting the original Directive into two. Although this tactic was not initially successful with concerted opposition from Member States, particularly over the issue of employee participation (Europa 2001b).

There are four types of SE (2157/2001/EC), the first three are formed through either, *merger* or formation of a *holding* or *subsidiary* company by two companies from different Member States. The forth is a formed through a *transformation* of a single Member State company that has had a subsidiary governed by another Member States law for at least two years (Article 2 para.1–4).

This combined with existing Member States ‘rules and practices’, and the Directives negotiated progress leads to detailed and complex supplementary Directive rules (see EIRR 336/2002). Although, the spirit of the supplementary Directive is that ‘information and consultation procedures at transnational level should nevertheless be ensured in all cases of creation of an SE’ (Whereas para.6). The main routes for employee involvement are through either a newly established representative body or information and consultation procedures. There is also scope for board level participation depending on negotiations and/or if this is applied in participant companies prior to SE formation. The Annex to the Directive lays out the main areas of information and consultation for the representative body. It is proposed that this body should meet with ‘the competent organ of the SE’ (Annex part 2b) on at least an annual basis, as does the Annex (para.2) to the EWC

Directive. The issues proposed for discussion in the Annex (part 2b and c) range from the state of the business financially, through its likely business development and changes in production processes, to probable mergers or cutbacks and closures of plants. There is also provision for special circumstance meetings: for example in the case of closures, relocations, etc. The terms and conditions of involvement are negotiated for employees through a proportionally elected special negotiating body (SNB), again found in the EWC Directive. Although, Article 3 para.6 states that the SNB can decide ‘not to open negotiations or to terminate negotiations ... and to rely on the rules on information and consultation of employees in force in the Member States where the SE has employees’.

This final supplementary Directive differs in a number of ways from its 1975 and 1989 predecessors. The 1975 draft proposed a far-reaching process of co-determination through an EWC and employee representatives acting as full board Members. By 1989 the emphasis had moved from co-determination through an EWC to information and consultation through four main routes, including board Membership or an employee only company-level representative body (EIRR 207/1991). Streeck (1997:) argues that the 1975 draft Directive was the closest ‘the community came to a wholesale adoption of the “German model”’ and notes Eser’s (1994) supposition that the 1989 version of employee participation was ‘an instrument of stable labor relations contributing to the success of the firm’ (Streeck 1997). Keller (2002: 442) positions the European Company Statute firmly within the national principle of subsidiarity, arguing that it will only make a minor contribution to ‘co-operative’ rather than ‘adversarial’ or ‘conflictual’ industrial relations. In sum he argues that ‘the power relationship that has led to the existence of “management prerogatives” in

national contexts will not be seriously challenged by SEs. In other words, strict new models for social partnership and “co-decision-making” or “joint regulation” of strategically important company affairs are not provided’ (ibid.: 442). As with the EWC Directive only time will tell its real contribution to greater employee influence through information and consultation.

THE EUROPEAN WORKS COUNCIL DIRECTIVE

The EWC Directive was adopted as part of the Social Chapter but was seen by some as a ‘watered-down’ or ‘toothless’ Vredeling (reported in EIRR 207/1991: 27) that was ‘extremely modest in its ambitions’ (Streeck 1997) compared to earlier employee participation directives. However, aside from these arguments that separate it from the more robust attempts at European employee participation it still displays a number of general similarities to them and perhaps not surprisingly, particularly to those draft Directives from 1983 onwards. For example with regard to the Directives general rather than specific information and consultation requirements.

In fact the Directive comes closest to the 1983 draft Vredeling Directive with its emphasis: on firms of 1,000 employees and over; the fall-back minimum requirements for existing representatives to be informed and consulted; the emphasis on annual information and consultation; and the subject areas to be informed and consulted on. Although, the recently adopted ECS Directive does have similarities it is more notable for its differences that ‘may

provide a pointer towards the changes which the Commission is planning to propose to the EWCs Directive' (EIRR 336/2002: 21). For example it explicitly allows Member States to transpose into law a right for trade union representatives, who do not have to be employed by the SE, to be members of the negotiating body (the SNB). It further offers an opportunity for peak union organisations (for example the ETUC) to be present as 'experts' when negotiations take place. It also defines the term 'information' and places a stronger emphasis on 'consultation' such that 'employees' representatives ... opinion on measures ... may be taken into account in the decision-making process' (EIRR 336/2002: 22; see the chapter by Buschak for an ETUC view on the Directive's weak information and consultation procedures). Finally it provides for greater scope for representative bodies to negotiate with SEs at times of 'exceptional circumstances' (i.e. closures etc.).

Interestingly the ECS takes priority over the EWC Directive when companies opt for SE status, Weiss (2001, quoted in Keller 2002: 437) has suggested that this 'may lead in the long run to a significant reduction of the scope of application of the Directive on European Works Councils' (ibid.: 9). Although he goes on to note that this 'will not mean a reduction of information and consultation in functional terms' (ibid.: 9).

The following provides a brief summery of the EWC Directive, adopted in 1994 and then transposed into Member State national law, it covers these and other countries within the European Economic Area (EEA), such as Norway. It contains three sections of 16 Articles and an Annex (full text of the Directive is available online at Europa – Europa 1994).

Section 1 – General

Section one contains three Articles covering the Directives objectives and definitions. Article 1 states that the objective of the Directive is ‘to improve the right to information and to consultation’ (para.1) for employees in Community-scale undertakings. This is to be achieved through either a European Works Council or a procedure for informing and consulting (where appropriate the Directive uses these joint terms throughout but for ease of reference only EWC is used here) which is established at group level (subject to Article 6). The scope of an EWC is ‘all the establishments (or a Community-scale group of undertakings) located within the Member States’ (subject to Article 6 wider participation) (para.4).

Articles 2 and 3 detail the Directives definitions, which start with an identification of the ‘triggers’ necessary to activate negotiations for an EWC. Article 2 (para.1a) states that a community undertaking, or groups of undertakings (controlled by a controlling undertaking) must have ‘at least 1000 employees within Member States and...150 employees in each of...two Member States’ (para.1a) for the Directive to apply.

The main parties conducting negotiations are employees’ representatives ‘provided for by national law and/or practice’ (para.1d) and central management ‘in the Community-scale undertaking or...the controlling undertaking’ of a group of undertakings (para.1e). The

body convened to conduct these negotiations for employees is a Special Negotiating Body (SNB) established ‘in accordance with Article 5 (para.2)’ (para.1h).

Article 3 concerns itself with defining a ‘controlling undertaking’ which is ‘an undertaking which can exercise a dominant influence over another undertaking’ (para.1). It lists a number of criteria for this including: holding a majority of subscribed capital (para.2a); controlling a majority of issued share capital votes (para.2b); appointing more than half the members of an ‘undertaking’s administrative, management or supervisory body’ (para.1c). It also notes in para.6 and 7 that the law applicable to determining whether an undertaking is a ‘controlling undertaking’ is the Member State law in which it resides.

Section 2 – Establishment of a European Works Council or an employee information and consultation procedure

This section contains Article 4 to 7 detailing the responsibilities of central management, Member States, and employees’ representatives. Article 4 lays the responsibility of creating ‘the conditions and means necessary for the setting up of an EWC...’ on an undertakings central management (para.1), or its representative in a Member State (para.2).

Article 5 lays out the procedures regarding a SNB; it opens by stating that the responsibility for initiating EWC negotiations is either central managements ‘or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States’ (para.1). Membership of the SNB

should be a minimum of three and maximum of 17 (para.2b – increased to 18 because of the UK opt-in in 1997), with representatives elected in accordance with an appropriate method determined by Member States. Each undertaking in a Member State must be represented by a member of the SNB with ‘supplementary members’ for those undertakings with higher numbers of employees (para.2c).

The Article further states that a SNB can be assisted by experts of their choice (para.4). But the SNB can also decide by at least a two thirds vote either ‘not to open negotiations in accordance with para.4 or terminate the negotiations already opened’. Where this occurs all procedures to conclude an agreement are stopped and a re-convention of the SNB will be ‘at the earliest two years after the above mentioned decision unless the parties concerned lay down a shorter period’ (para.5).

The Article also states that ‘any expenses relating to the negotiations referred to in para.3 and 4 shall be borne by central management’ (para.6), although, it allows Member States to ‘lay down budgetary rules’ for the SNB which ‘may in particular limit the funding to cover one expert only’ (para.6).

Article 6 lays down that an agreement reached under the Directive should determine:

- The undertakings covered by the agreement (para.2a);
- the EWCs allocation of seats, number of members and their term of office (para.2b);
- the functions and procedure for information and consultation of the EWC (para.2c);

- the frequency, duration and venue of EWC meetings (para.2d);
- the financial and material resources allocated to the EWC (para.2e);
- the duration of the agreement and the procedure for its renegotiation (para.2f).

The Article also states that central management and the SNB can agree ‘to establish one or more information and consultation procedures instead of a European Works Council’ (para.3). Any agreement made under the terms of para.2 or 3 is not subject to the subsidiary requirements of the Annexe, unless it states otherwise. The final para.5 requires that when concluding an agreement the SNB acts by a majority vote of its members.

Article 7 lays down that the subsidiary requirements for an agreement based on the provisions in the Annexe are laid down in legislation of the Member State in which the central management is situated (para.1). These requirements come into force if:

- central management and the SNB decide that they should;
- central management refuses to commence negotiations within six months of the request referred to in Article 5 (para.1);
- an Article 6 agreement is not reached after three years from the date of the request and the SNB has not taken a decision as provided for in Article 5 (para.5).

Section 3 – Miscellaneous provisions

This section begins with Article 8, which deals with confidential information. It makes it the responsibility of Member States to ‘provide’ that members of SNBs or EWCs and any experts ‘are not authorised to reveal any information which has expressly been provided to them in confidence’ (para.1). Central management are also given the right not to pass on information that ‘according to objective criteria...would seriously harm the functioning of the undertaking’.

Article 9 emphasises that central management and employee representatives should work together ‘in a spirit of cooperation’. It follows this in Article 10 by stating that protection for employees’ representatives, whilst undertaking their duties at SNBs or EWC, should be the same as that ‘provided for employees’ representatives by the national legislation and/or practice in force in their country of employment’ (sub-para.1).

Article 11 specifies that Member States are responsible for ensuring that the management of an undertaking covered by the Directive and its employees’ representatives or employees ‘abide by the obligations laid down by this Directive’ (para.1); that if requested undertakings provide information on the number of employees employed at undertakings (para.2); that Member States ‘shall provide appropriate measures’ (para.3) so that the Directive can be enforced; and that where Member States apply Article 8 (confidential information) there should be provision for ‘administrative or judicial appeal procedures’.

Article 12 states that the ‘Directive shall apply without prejudice to measures taken pursuant’ (para.1) to Council Directives 75/129/EEC (collective redundancies) and

77/187/EEC (safeguarding employees' rights in the event of transfers of undertakings, businesses or parts of businesses), and to 'employees' existing rights to information and consultation under national law' (para.2).

Article 13 states that the Directive shall not apply to agreements before 22nd September 1996 (Article 14 para.1), or the date it is transposed into the national law of the Member State concerned if this is earlier and it covers 'the entire workforce, providing for the transnational information and consultation of employees' (para.1). It also specifies that when these agreements expire the parties can either renew them or have the provisions of the Directive applied.

Article 14 was probably one of the most important at the time as it laid down the final date (22nd September 1996) by which Member States had to transpose the Directive into national laws. Article 15 states that by 22nd September 1999 the Commission shall conduct a review of the Directive, in conjunction with Member States and management and labour at a European level. It notes in particular that workforce size thresholds will be reviewed. Article 16 simply states that the 'Directive is addressed to the Member States'.

Annexe – Subsidiary requirements: referred to in Article 7

The Annexe specifies the rules that govern a EWC constituted under an Article 7 (subsidiary requirements) agreement. A number of these have already been covered in the

Directives main requirements and relate to a EWCs scope; procedures; and financial expenses. The others state that:

- The EWC shall have a minimum of three members and a maximum of 30 (para.1c).
Where size so warrants it shall elect a select committee of a maximum of three members.
- After four years the EWC must ‘examine whether to open negotiations for the conclusion of the agreement referred to in Article 6...or continue to apply the subsidiary requirements’ (para.1f).
- The EWC shall meet have the right to meet once a year and be informed and consulted on a report drawn up by central management on the progress of the business. The meeting ‘shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies’ (para.2).
- Where there are exceptional circumstances affecting employees (relocations, closures etc.) the select committee or EWC has the right to be informed. It shall have the right to meet with central management or any appropriate level of management to be informed

and consulted on these matters. Any members of the EWC directly concerned with any matters have a right to participate in any such meeting. This meeting shall occur as soon as possible on the basis of a report drawn up by central management 'on which an opinion may be delivered at the end of the meeting or within a reasonable time....This meeting shall not affect the prerogatives of the central management' (para.3).

- The EWC or select committee 'shall be entitled to meet without the management concerned being present' (para.4).
- The EWC members shall inform the employees' representatives or in their absence the workforce concerned of EWC information and consultation (para.5).
- The operating costs of the EWC, borne by central management, shall in particular cover '...the costs of organising meetings and arranging for interpretation facilities and accommodation and travelling expenses of members of the EWC and its select committee...unless otherwise agreed' (para.7).

CONCLUSION

This chapter has provided a brief introduction to the main attempts at employee participation at a European level, ending with a summary of the successfully adopted EWC Directive. It has detailed the most important issues in each proposal but not dwelt on the

debate surrounding these. The opinion here is that each only offers a framework that might, or might not, succeed depending on a complex network of factors, including power, influence and control, and of course ones definition of success. For example what power will a European Directive have after transposition into national law and submersion in national industrial relations culture? What influence will this have on a multinational company and more importantly its employees and their representatives? How will that alter or influence control at a transnational level?

The remainder of this book begins to explore these questions in the only way possible, through a consideration of the Directive in practice, as EWC agreements are signed and their communication bodies begin to function. In it a number of authors chart the factors that fuse with the EWC Directives' framework influencing the negotiation of agreements and their practice, whilst others question the Directives framework itself. The reader is introduced to the study of the EWC and the discussion surrounding its composition, influence and possible expansion beyond the boundary of Europe.

The chapters in this book each contain with them, either explicitly or implicitly, reference to a continuing debate that can be loosely described as that between the 'optimists' and 'pessimists'. Employers, politicians, trade unions, workers and even academic commentators will offer differing views depending on their own perspectives and, most particularly, their expectations of EWCs. If not much is expected then, perhaps, not much will be achieved and pessimistic commentators on EWCs will be right to judge them as marginal at best and irrelevant at worst. Such a conclusion would confound those who

fought for decades to see their vision turned into reality via the European Commission and it is not the conclusion of the authors of the chapters contained here. We present a range of views from employer representatives and individual employers, through ‘insiders’ dealing with the daily reality of EWCs to ‘outside’ commentators offering objective appraisals. The chapters in this book share a common view in, now that they are here, at least making EWCs work. That places them in a more optimistic tradition. It is clear that EWCs face major challenges in organisation and practice, that they are challenged in one direction from the pressures of nationalism and in the other by the demands of globalism and that the existence of structure cannot be equated with the practice of action. Nevertheless, as institutions barely yet a decade old, EWCs are beginning to find a role and develop their particular strengths in ways that will ensure their continued growth and their emergence from what were once described as global outposts representing workers on the periphery (Fitzgerald et. al. 1999, Stirling and Fitzgerald 2001) to core institutions in an international labour movement.

The following chapters offer a starting point and signpost further reading but hopefully more than this they provide a sustainable collection of essays that can be referenced in the future as EWC history unfolds.

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